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30 October 2002

Via Facsimile Only to 858-571-6972

John Robertus, Executive Officer
California Regional Water Quality Control Board
9174 Sky Park Court
San Diego, CA 92123

Re: Comments to Tentative Order no. R9-2002-0169, NPDES Permit no. CA0109169, for the U.S. Navy

Dear Mr. Robertus:

On behalf of my client, Divers' Environmental Conservation Organization ("DECO"), I am writing to offer various comments on the above-referenced tentative Order of the California Regional Water Quality Control Board in San Diego ("the Regional Board") for the U.S. Navy. DECO is concerned that the Order is too lax and will not adequately protect San Diego Bay and the San Diego coastline from the Navy's stormwater discharges.

DECO is a non-profit organization with members throughout California and a mission to advocate on behalf of divers and other aquatic enthusiasts in order to achieve and enhance both enforcement of and compliance with laws protecting aquatic resources. DECO's focus on the San Diego region should not be surprising, given the region's outstanding reputation for scuba diving. However, DECO's members also take part in fishing, paddling, swimming and similar water-contact activities on or near San Diego Bay and other receiving waters affected by the Navy's discharges of stormwater.

While DECO commends the Regional Board for its efforts to bring the Navy's operations into the National Pollutant Discharge Elimination System ("NPDES") regulatory scheme at last, the tentative Order contains several significant deficiencies. Those deficiencies are discussed below.

Disparities in Regulation of U.S. Navy and San Diego's Commercial Shipyards

The first deficiency is that the prohibitions, discharge specifications, and receiving-water limitations in the tentative Order for the Navy are considerably weaker than are corresponding provisions in proposed permits for commercial shipyards like Southwest Marine (*see* Tentative Order no. R9-2002-0161) and Continental Maritime (*see* Tentative Order no. R9-2002-0282). In light of the fact that the Navy's operations include ship repair and maintenance--as do Southwest Marine's and Continental Maritime's operations--the tentative Order must be drafted to account for all likely discharges. The proposed permits for the commercial dischargers anticipate a wide variety of pollutants in their discharges, and there is no justification to apply a weaker standard to the Navy when it comes to its pollution.

For instance, the tentative Order does not contain a specific prohibition on discharges of refuse and like debris, of visible amounts of petroleum substances, or of waste or pollutants from underwater operations, unlike Continental Marine's proposed permit. (*See* Tentative Order no. R9-2002-0282, ¶¶ A-6, A-7 & A-10.) Interestingly, the Fact Sheet for the Navy's tentative Order lists many different kinds of discharge--*e.g.*, swept materials, fiberglass dust, hydraulic oil, fuel, vessel washdown water, hydrostatic test water, and miscellaneous low-volume water--that have the potential to impair water quality, and yet those discharges are not specifically prohibited in the tentative Order as they are in the proposed permits for commercial shipyards. (*See* Fact Sheet for Tentative Order no. R9-2002-0169, § II-a.) Why is the Navy not prohibited from discharging everything identified in the Fact Sheet as a possible source of pollution? Why does the Navy not have to prevent harmful discharges identical to those prohibited at commercial shipyards?

In addition, Paragraph B-4-a of the tentative Order gives the Navy four years to meet the requirements for acute toxicity of undiluted stormwater, whereas the commercial shipyards must comply as soon as their permits take effect. (*See* Tentative Order no. R9-2002-0161, ¶ B-2; and Tentative Order no. R9-2002-0282, ¶ B-2.) My firm has found nothing in the scientific literature or elsewhere to suggest that commercial shipyards employ pollution-control technologies that are not available to the Navy. If commercial shipyards must immediately control their acutely toxic discharges to the San Diego Bay, the Navy should have to do the same. What is more, federal regulations require compliance "as soon as possible" (*see* 40 CFR § 122.47(a)(1)), and there has been no finding by the Regional Board that the Navy needs four years to achieve compliance.[1]

Similarly, the proposed permits for commercial shipyards require them to keep discharges "essentially free" of floatable and settleable objects, accumulatively toxic substances, materials that cause aesthetically undesirable color in receiving waters, and substances that impair natural light in the benthic zone. (*See* Tentative Order no. R9-2002-0161, ¶ B-9; and Tentative Order no. R9-2002-0282, ¶ B-7.) As before, there appears to be no reason to treat the Navy differently.

Yet another disparity between the Navy's tentative Order and the commercial shipyards' proposed permits can be found by comparing the various limitations with regard to the receiving waters. The proposed permits contain provisions protecting natural light, marine communities, sediments, temperature, and the water column, among other things. (*See* Tentative Order no. R9-2002-0161, § C; and Tentative Order no. R9-2002-0282, § C.) Unfortunately, similar protections are not in the tentative Order. These differences are inexplicable, and they would lead the casual observer to conclude--erroneously-- that the Navy is discharging to a body of water distinct from the one to which the commercial shipyards are discharging. Accordingly, the tentative Order for the Navy should be brought into line with the proposed permits for the commercial shipyards.

Perhaps the most disconcerting difference between the tentative Order and the proposed permits is the former's treatment--perhaps it is better to say, its *lack* of treatment--of violations of the California Toxics Rule (discussed below) and other water-quality objectives and standards. For a reason not explained anywhere in the tentative Order's findings or Fact Sheet, the Navy is deemed in compliance with the applicable objectives and standards, *even when its discharges are causing or contributing to exceedances of those objectives and standards*, as long as it follows a

[1] It should be noted that a permit must also establish interim dates for compliance if it contains a compliance schedule (in this case interim dates may not exceed one year) and must impose reporting requirements on the discharger's progress in achieving compliance. *See* 40 CFR § 122.47(a)(3).

prescribed review-and-report regimen with regard to best management practices ("BMPs") for reducing and preventing pollution. In other words, despite the tentative Order's requirement that the Navy not violate water-quality standards or objectives, the fact is that Paragraph C-3 imposes no effective discharge limitation at all. Attachment D to the tentative Order already requires the Navy to identify BMPs to prevent anticipated pollution, and it requires annual reviews of those BMPs. Paragraph C-3 merely tells the Navy to do the analysis again if its first attempt (and its second, and its third, etc.) does not adequately protect the receiving waters. Under the tentative Order's approach, limitations on discharges to receiving waters simply do not exist. As with the toxicity requirements (discussed above), the tentative Order gives the Navy special treatment for no good reason.

These are just a few of the differences that jump out when one attempts to compare the tentative Order and the proposed permits, and the disparities in the Regional Board's regulation of the Navy and the commercial shipyards must be corrected or justified. As they stand now, the differences appear to have no basis in reason.

Conflict between California Toxic Rule and U.S. Navy's Tentative Order

In May 2000, the U.S. Environmental Protection Agency published the California Toxics Rule ("CTR"), which established water-quality objectives for San Diego Bay (among other State waters) and was adopted by the State Water Resources Control Board. According to the CTR, the maximum concentration and the continuous concentration for copper in San Diego Bay may not exceed 4.8 ug/L and 3.1 ug/L, respectively; the corresponding limits for zinc are 90 ug/L and 81 ug/L, respectively. The tentative Order is unclear, however, for two particular toxic pollutants regulated by the CTR: copper and zinc.

The lack of clarity in the tentative Order has to do with Paragraph B-2, which establishes a series of tasks that the Navy must follow when its industrial stormwater contains more than 63 ug/L of copper or 117 ug/L of zinc. As currently written, Paragraph B-2 could be construed in a number of ways: (1) it might be construed as allowing the Navy to discharge *any* level of copper or zinc provided that the enumerated tasks are performed when the threshold levels are detected; (2) it might be construed as allowing the Navy to discharge a level of copper or zinc that is equal to or more than the threshold but is limited by some other provision of the tentative Order; or (3) it might be construed as merely requiring the Navy to take various steps if it discharges a level of copper or zinc above the threshold, in addition to any other remedies that could be imposed for discharges that violate the CTR. Since the first two interpretations would not be consistent with the Clean Water Act or California law--since allowing such high levels of copper and zinc to be discharged would violate the applicable anti-degradation policies and would exceed the CTR's limits--the only proper interpretation is the third. In order to avoid ambiguity, the tentative Order should be revised to indicate that the Navy must undertake certain steps if it contributes to levels of copper or zinc in excess of the applicable water-quality objectives, *in addition to* any remedies that are otherwise appropriate for such exceedances. While Paragraph C-1 of the tentative Order requires the Navy to abide by the CTR, Paragraph B-2 as it is now could be interpreted to exempt the Navy from the CTR's copper and zinc limitations. The Regional Board must take steps to preclude such an interpretation.

Absence of Numeric Limitations for Copper, Zinc and Other Toxic Pollutants

Returning to the topic of copper, zinc, and other toxic pollutants, the tentative Order must contain an effluent-based limitation for each priority pollutant identified in the CTR that "causes

or has the reasonable potential to cause" violations of the CTR . *See* 40 CFR § 122.44(d)(1)(iii). Moreover, Section 1.3 of the Inland Surface Waters Plan requires the Regional Board to conduct an analysis to determine whether effluent-based limitations are necessary for priority pollutants identified in the CTR. However, nothing in the tentative Order indicates that this analysis was performed; rather, the Fact Sheet suggests that the Regional Board plans to receive data from the Navy in order to consider whether effluent limitations are necessary. With regard to copper, one should note, it is already certain that any discharge of it to San Diego Bay will contribute to a violation of water-quality standards, since the Bay is already impaired for copper; thus, the limit on discharges of copper must be zero. Consequently, the Regional Board should determine what priority pollutants require effluent limitations, and the tentative Order should be revised to reflect the findings.

Limitations for Receiving Waters Require Revision

Two provisions in the Navy's tentative Order require revision in order to strengthen the limitations on discharges to receiving waters. Paragraph C-2, for example, prohibits discharges that "adversely *affect* human health and the environment." (*See* Tentative Order no. R9-2002-0169, ¶ C-2 (emphasis added).) However, Paragraph C-1 of the permit that operated previously, the State Water Resource Control Board's Water Quality Order no. 97-03-DWQ, prohibited all discharges that "adversely *impact*" humans and the environment. While the meanings of "affect" and "impact" are similar, a change in operative regulatory terms without an explanation makes it possible for the Navy to contend that the new language is weaker than the previous language. I doubt that the Regional Board intends to open the door for such a contention, as doing so would be a clear case of back-sliding and thus a violation of federal and State law. Consequently, the Regional Board should *either* use "impact" *or* explain in the tentative Order's findings or in the Fact Sheet that "affect" is at least as comprehensive as "impact" (if not broader altogether).

Additionally, Paragraph C-3's first sentence is vague in its use of "timely." Exactly how much time does the Navy have in order to comply with the limitations on discharges to receiving waters? Nothing in this provision gives the Navy or anyone else a hint.

Lack of Monitoring Requirements

Another troubling aspect of the Navy's tentative Order is that it contains no monitoring requirements for discharges of industrial stormwater to receiving waters. The Monitoring and Reporting Program's Appendix A lists ten kinds of discharge for which monitoring of receiving waters must be conducted, but the only one that could possibly cover industrial stormwater is for "miscellaneous" discharges. If miscellaneous discharges are understood by the Regional Board to include industrial stormwater, then the tentative Order needs to make that much explicit. If there is a different understanding, then there would appear to be a direct conflict with the federal regulations requiring each permit to establish monitoring requirements. *See* 40 CFR §§ 122.44(i) and 122.48. After all, the Clean Water Act is built on the premise that pollution controls work best when the regulators, the dischargers, and the public know what pollutants are present in the Nation's waters.

Form of Compliance Schedule

In order to maintain the strength of the NPDES program, the Regional Board should give serious consideration to revising the tentative Order so that all final limitations appear *on its face* and then issue a separate compliance order. This ensures consistency in the form of the Regional

Board's permits for similar discharges and at the same time takes into account each discharger's unique circumstances.

Conclusion

Divers' Environmental Conservation Organization is concerned that the tentative Order is too lax and, without justification, creates different regulatory standards. Members of DECO will continue to be harmed by polluted discharges from the Navy if the Regional Board does not set and enforce strict requirements. The Regional Board is moving in the right direction for private-sector shipyards, but it is not embracing its responsibility to control the Navy's pollution. The tentative Order must be revised in order to restore the health of the San Diego Bay and the San Diego coastline and to ensure consistency in the way that the San Diego region's dischargers are regulated.

In closing, I wish to add that DECO shares the concerns expressed by the Environmental Health Coalition ("EHC") and others with regard to the tentative Order, and EHC's comments, to the extent not inconsistent with the foregoing comments, are adopted by DECO.

Thank you for your anticipated consideration of DECO's comments. If you would like more information regarding these comments, or if you wish to discuss this matter further, please do not hesitate to contact me.

Sincerely,

BRIGGS LAW CORPORATION

Cory J. Briggs